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IN THE

Supreme Court of the United States

October Term, 1965.

No. 975.

THE ÆTNA CASUALTY AND SURETY COMPANY,
Petitioner,

v.

THIRD NATIONAL BANK AND TRUST COMPANY, OF SCRANTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENT'S BRIEF IN OPPOSITION.

ERNEST J. GAZDA,
708-12 Northeastern National Bank Building,
Scranton, Pennsylvania. 18503
Counsel for Respondent.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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SUMMARY OF THE ARGUMENT.

Point I.

The petitioner having been aware of the decision in the case of *Fidelity Trust Co. v. American Surety Co. of N. Y.*, 268 F. 2d 805, and having renewed the indemnity bond for respondent without changing the pertinent language thereof, is bound by the law of said case.

Point II.

The substantive law of Pennsylvania does not limit the meaning of the "written instruments" to that adopted by the Pennsylvania legislature in the Uniform Commercial Code, to wit: that a written instrument means a negotiable instrument.

Point III.

The conflict between the decision of the Court below and other circuits of the United States Courts of Appeals is not one of such great importance as to affect the public interest in general but is only of a private nature.

ARGUMENT.

Point I.

This case involves the interpretation of a paragraph in an indemnity bond between petitioner and respondent, specifically, paragraph E of the "Bankers Blanket Bond, Standard Form No. 24" (R. 37a). On June 23, 1959, the United States Court of Appeals for the Third Circuit, in the case of *Fidelity Trust Co. v. American Surety Co. of N. Y.*, 268 F. 2d 805, opinion written by Goodrich, Circuit Judge, decided that fictitious invoices which were in question were counterfeited written instruments according to the meaning of the term as set forth in said paragraph or clause E of the indemnity bond.

The petitioner, as well as other bonding companies, were acquainted with this decision, and the petitioner as such had the choice of changing the language of the bond or sell the bond to banks with the interpretation placed on said term in question by the said Third Circuit of the United States Court of Appeals. Having elected to sell this identical bond to the respondent for a period from May 1, 1956, to the present time, the petitioner is estopped from denying that paragraph E has any other interpretation except that set forth in said *Fidelity Trust Co.* case (*supra*). Petitioner is, therefore, bound by said decision.

Point II.

The question whether unsigned copies of invoices are the writings embraced by the terms securities, documents or other written instruments within the coverage of the bond was not decided by the lower court in conflict with the substantive law of Pennsylvania as declared by its legislature in the Uniform Commercial Code, 12A P. S., Sections 9-105(1), (e), (g); 9-309; 12A P. S., Sections 8-102; 8-105 (1); 8-201; 8-205; 8-208; 8-311; 12A P. S., Section 1-201(15),

(18), (40), (43); 12A P. S., Sections 3-102(1), (e); 3-104 (a); 3-401(1); 3-404.

The Pennsylvania Uniform Commercial Code was adopted for the following purposes: 12A P. S., Section 1-102(2), (a), (b), and (c) which reads as follows:

> "(2) underlying purposes and policies of this Act are
>
> (a) to simplify and modernize and develop greater precision and certainty in the rules of law governing commercial transactions;
>
> (b) to preserve flexibility in commercial transactions and to encourage continued expansion of commercial practices and mechanisms through custom, usage and argument of the parties;
>
> (c) to make uniform the law among the various jurisdictions."

It is submitted that the Bankers Blanket Bond, the subject matter of this case, does not fall within the scope of the Uniform Commercial Code. It is an indemnity bond not within the purview of the said code.

It is not contended by Respondent that said fictitious invoices are to be classified as securities. It is contended, however, that they are "other written instruments" which were "counterfeited" and, therefore, within the coverage of paragraph E of said Blanket Bond.

The substantive law of Pennsylvania does not limit the meaning of the term "written instruments" to that set forth in the Pennsylvania Uniform Commercial Code (*supra*).

As stated by the lower court in its memorandum opinion, filed July 10, 1964 (memo. op. R. 61a):

> "In Pennsylvania the term 'written instruments' has been held to include petitions to strike off names from voters' registry lists, Commonwealth of Pennsylvania

v. Powers, 110 Pa. Superior Ct. 319; a railroad ticket, Commonwealth of Pennsylvania v. Wilson, 44 Pa. Superior Ct. 183; a duplicate state tax receipt, Commonwealth of Pennsylvania v. Leib, 76 Pa. Superior Ct. 413; a receipt for taxes, Commonwealth of Pennsylvania v. Phipps, 16 Phila. Rep. 457; a diploma from a college, McClure v. Commonwealth of Pennsylvania, 86 Pa. 353; receipts for pilot fees, Commonwealth of Pennsylvania v. Fitzpatrick, 3 D. R. 305; a marriage certificate, Commonwealth of Pennsylvania v. Compton, 7 Lacka. Leg. News, 108; a naturalization certificate, United States v. Randolph, 1 Pitts. 24; a miner's certificate, Commonwealth of Pennsylvania v. Wyoda, 44 Pa. Superior Ct. 552."

The lower court further stated (R. 619-61b) as follows: "Consequently, it is my determination that the term 'written instruments' in the Commercial field cannot be conclusively confined to negotiable instruments as defined in the Uniform Commercial Code."

Point III.

Even though there is an apparent if not real conflict between the decision of the Court below and other circuits of the United States Courts of Appeals, the conflict is not of such great importance to the public in general so as to warrant the granting of a Writ of Certiorari.

Respondent submits that this case is one of private not of national public interest. It is an agreement of indemnity between private parties. The bond was prepared and issued by petitioner. The language of the bond cannot be resolved in favor of the one who chose the words and as a business transaction issued the bond to another. *Reid v. Sovereign Camp, Woodmen of the World,* 1941, 340 Pa. 400, 17 A. 2d 890; *Diskin v. Police Pension Fund Association,* 1951, 367 Pa. 273.

CONCLUSION.

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this court, and that the petition for a writ of certiorari should be denied.

Dated February 22, 1966.

ERNEST J. GAZDA,
Counsel for Respondent.

APPENDIX.

Statutes Involved.

UNIFORM COMMERCIAL CODE.

12A P. S., Section 1-102(2), (a) (b), and *(c)* which reads as follows:

"(2) Underlying purposes and policies of this Act are

(a) to simplify and modernize and develop greater precision and certainty in the rules of law governing commercial transactions;

(b) to preserve flexibility in commercial transactions and to encourage continued expansion of commercial practices and mechanisms through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions."

12A P. S., Section 1-201. General Definitions.

"Subject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Act:

"(15) 'Document of Title' includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it entitled to receive, hold and dispose of the document and

the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

"(18) 'Genuine' means free of forgery or counterfeiting.

"(39) 'Signed' includes any symbol executed or adopted by a party with present intention to authenticate a writing.

"(40) 'Surety' includes guarantor.

"(43) 'Unauthorized signature or endorsement' means one made without actual, implied or apparent authority and includes a forgery."

12A P. S., Section 9-105. Definitions and Index of Definitions.

"(1) In this Article (9,—Secured Transactions), unless the context otherwise requires:

"(e) 'Document' means document of title as defined in the general definitions of Article 1 (Section 1-201);

"(g) 'Instrument' means a negotiable instrument (defined in Section 3-104), or a security (defined in Section 8-102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary endorsement or assignment;"

12A P. S., Section 9-309. Protection of Purchasers of Instruments and Documents.

"Nothing in this Article limits the rights of a holder in due course of a negotiable instrument (Section 3-302) or a holder to whom a negotiable document of title has been duly negotiated (Section 7-501) or a bona fide purchaser of a security (Section 8-301) and such holders or purchasers take priority over an earlier security interest even though perfected. Filing under this Article does not constitute notice of the security interest to such holders or purchasers."

12A P. S., Section 8-102. Definitions and Index of Definitions.

"(1) In this Article unless the context otherwise requires

"(a) A 'security' is an instrument which

(i) is issued in bearer or registered form;

(ii) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and

(iii) is either one of a class or series or by its terms is divisible into a class or series of instruments;"

12A P. S., Section 8-105. Securities Negotiable; Presumptions.

"(1) Securities governed by this Article are negotiable instruments.

12A P. S., Section 3-102. Definitions and Index of Definitions.

"(1) In this Article unless the context otherwise requires

(e) 'Instrument' means a negotiable instrument."

12A P. S., Section 3-104. Form of Negotiable Instrument; . . . "Note".

"(1) Any writing to be a negotiable instrument within this Article must

(a) be signed by the maker or drawer; and

(b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; and

(c) be payable on demand or at a definite time; and

(d) be payable to order or to bearer.

"(2) A writing which complies with the requirements of this section is . . .

(b) A 'note' if it is a promise other than a certificate of deposit."

12A P. S., Section 3-401. Signature.

"(1) No person is liable on an instrument unless his signature appears thereon.

"(2) A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature."